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Second report on the effects of armed conflicts on treaties by Mr. Ian Brownlie, Special Rapporteur

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A. Introduction

1. The purpose of the present report is to present the first seven draft articles of the original draft, contained in the first report on the effects of armed conflicts on treaties (A/CN.4/552), submitted at the fifty-seventh session of the International Law Commission, with reference to issues raised in the subsequent debates in the Commission and the Sixth Committee of the General Assembly. The presentation of the first seven draft articles would seem to be a practical way of moving forward. The Special Rapporteur had, during the debate at the fifty-seventh session of the Commission, emphasized that the first presentation was provisional in character and did not involve a rush to judgment.[1]

B. Preliminary issues

2. The responses to the first report have helped to clarify a number of issues.

3. Several delegations favoured the inclusion of treaties concluded by international organizations (Morocco,[2] Jordan,[3] Nigeria,[4] Poland,[5] China[6] and Indonesia[7]). During the debate in the Commission several members supported the inclusion of such treaties.[8] However, there was no general agreement that this was necessary and reference was made to article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.[9]

4. General support was expressed for the view of the Special Rapporteur that the topic should form part of the law of treaties and not part of the law relating to the use of force. As the topical summary indicates (A/CN.4/560, para. 47), at the same time it was observed that the subject was closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility.

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[1] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 124.

[2] A/C.6/60/SR.11, para. 41.

[3] A/C.6/60/SR.19, para. 32.

[4] A/C.6/60/SR.20, para. 47.

[5] A/C.6/60/SR.19, para. 20.

[6] A/C.6/60/SR.18, para. 8.

[7] A/C.6/60/SR.20, para. 9.

[8] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 129.

[9] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II (United Nations publication, Sales No. E.94.V.5).

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C. Draft articles

Draft article 1
Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

5. In the Sixth Committee the view was expressed that, since article 25 of the Vienna Convention on the Law of Treaties[10] allowed for the provisional application of treaties, it seemed advisable that the draft articles should apply to treaties that were being provisionally applied.[11]

6. In the Commission it was suggested that a distinction be made between States which are contracting parties, under article 2, paragraph (1) (f), of the Vienna Convention, and those which are not. While some members preferred including treaties which had not yet entered into force, others considered that only treaties in force at the time of the conflict should be covered by the draft articles.[12]

Draft article 2
Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

Treaty

7. This formulation did not provoke any comment.

Armed conflict

8. This definition of armed conflict was examined in the first report (A/CN.4/552, paras. 16-22). The draft articles proposed by the Special Rapporteur include the effect on treaties of internal conflicts. At the same time a proportion of the doctrine regards the distinction between international armed conflict and non-international armed conflict as basic in character, and would exclude the latter for present purposes.

[10] United Nations, *Treaty Series*, vol. 1155, p. 331.
[11] Comment by the Netherlands, in A/C.6/60/SR.18, para. 40.
[12] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 130.

9. This question provoked marked differences of opinion in the Sixth Committee. Five delegations were opposed to the inclusion of internal armed conflicts (Algeria,[13] Austria,[14] China,[15] Indonesia[16] and the Islamic Republic of Iran[17]). Six delegations were in favour of including non-international armed conflicts (Greece,[18] Morocco,[19] Nigeria,[20] the Netherlands,[21] Poland[22] and Slovakia[23]). The policy considerations which should apply point in different directions. If the principle of continuity were to be adopted, then the inclusion of non-international armed conflicts would militate in favour of stability. However, the principle of continuity is in many ways conditional, and widening the breadth of the definition of armed conflict would increase the scope of the problem.

10. A number of sources relating to the task of definition were invoked, as follows:

(a) *Prosecutor v. Dusko Tadic*: "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.";[24]

(b) The Vienna Convention on the Law of Treaties, article 73, refers to "the outbreak of hostilities between States";

(c) There is the possible relevance of the report of the High-level Panel on Threats, Challenges and Change (A/59/565 and Corr.1, sect. IV).

11. Two other points should be borne in mind. The first was made by the Netherlands delegation:

> The final point to be raised in relation to the definition of armed conflict is that military occupations should indeed be included, even if not accompanied by protracted armed violence or armed operations. The fact that a state is under occupation can affect its ability to fulfil its treaty obligations. This is in keeping with the relevant provisions of international humanitarian law, notably Article 2 of the four Geneva Conventions of 1949, which is *lex specialis* in this field. If such an occupation is sufficient to trigger the applicability of the specific norms related to armed conflicts, then it would also seem sufficient to trigger the applicability of the draft articles on the effect of armed conflict on treaties. In this regard, the decision of the Special Rapporteur to include a

[13] A/C.6/60/SR.20, para. 64.
[14] A/C.6/60/SR.18, para. 26.
[15] Ibid., para. 8.
[16] A/C.6/60/SR.20, para. 9.
[17] A/C.6/60/SR.18, para. 2.
[18] A/C.6/60/SR.19, para. 36.
[19] A/C.6/60/SR.11, para. 41.
[20] A/C.6/60/SR.20, para. 47.
[21] A/C.6/60/SR.18, paras. 43-44.
[22] A/C.6/60/SR.19, para. 18.
[23] Ibid., para. 45.
[24] International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-A72, *Prosecutor v. Duško Tadić a/k/a "DULE"*, Appeals Chamber, 2 October 1995, para. 70 (1994-1995), 1 ICTY JR 352, at para. 70, reprinted in *International Legal Materials*, vol. 35 (1996), p. 32.

reference in draft article 5, paragraph 1, of international humanitarian law as *lex specialis* is worthy of support.[25]

12. A concern was expressed during the debate at the fifty-seventh session of the Commission that the language proposed by the Special Rapporteur applied to situations that might fall outside the ordinary concept of armed conflict, such as violent acts by drug cartels, criminal gangs and domestic terrorists. However, the wording of draft article 2, paragraph (a), is intended to avoid such mischaracterizations. It is surely obvious that the application of the concept of "armed conflict" must be appropriately contextual. If this involves "circularity", as contended by some members of the Commission, then so be it.

13. The definition of armed conflict should be dealt with on a pragmatic basis. It would be helpful if a general indication on the inclusion or not of non-international armed conflicts could be obtained from the plenary. It must be clear that it would be inappropriate to seek to frame a definition of "armed conflict" for all departments of public international law.

Draft article 3
Ipso facto termination or suspension

The outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties as:

(a) Between the parties to the armed conflict;

(b) Between one or more parties to the armed conflict and a third State.

14. The precise origin and significance of draft article 3 is explained in the first report (see A/CN.4/552, paras. 25-28). Draft article 3 is the most significant product of the resolution adopted by the Institute of International Law in 1985.[26] The majority of the delegations in the Sixth Committee did not find draft article 3 to be problematical. Austria expressed the view that the underlying concept of draft article 3 "is the point of departure of the whole set of draft articles" (A/C.6/60/SR.18, para. 27). There is considerable support for the view that the formulation "ipso facto" should be replaced with "necessarily".[27]

15. As the Special Rapporteur explained to the Commission, the purpose of draft article 3 is essentially constitutional, and the operative provisions are in draft articles 4 to 7. Thus, in the report of the Commission it is stated that:

> The Special Rapporteur characterized draft article 3 as being primarily expository in nature: in the light of the wording of subsequent articles, particularly draft article 4, it was not strictly necessary. Its purpose was merely to emphasize that the earlier position, according to which armed conflict automatically abrogated treaty relations, had been replaced by a more contemporary view according to which the mere outbreak of armed conflict, whether declared war or not, did not ipso facto terminate or suspend treaties in force between parties to the conflict. He would, however, not oppose the deletion of the provision if the Commission so desired. Its formulation was

[25] Summarized in A/C.6/60/SR.18, para. 44.

[26] *Annuaire de l'Institut de droit international*, vol. 61-I (1985), pp. 25-27.

[27] For the debate in the Commission see *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 142-148.

based on article 2 of the resolution adopted by the Institute of International Law in 1985.[28]

16. And further:

> While support was expressed for the Special Rapporteur's proposal, some members pointed out that there existed examples of instances of practice, referred to both in the Special Rapporteur's report and the Secretariat's memorandum, that appeared to suggest that armed conflicts cause the automatic suspension of various categories of treaty relations, in whole or in part. Indeed, it was suggested that the articles should not rule out the possibility of automatic suspension or termination in some cases. In terms of another suggestion, the provision could simply state that the outbreak of armed conflict did not necessarily terminate or suspend the operation of any treaty.[29]

17. In conclusion, and further by way of emphasis, draft article 3 is only a precursor to draft articles 4 to 7.

Draft article 4
The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict in question.

18. Draft article 4 represents the mode of practical implementation of the principle affirmed in draft article 3. The majority of responses to the draft accepted the principle lying behind draft article 4, but there were reservations about the problem of proving intention. The policy adopted by the Special Rapporteur is indicated clearly in the first report (see A/CN.4/552, paras. 45-54).

19. The reservations of members of the Commission (and some delegations) relating to the role of intention call for close examination. In the first place, given the character of the subject matter (as a part of the law of treaties), it is unrealistic to assert that the role of intention should be marginalized. At the same time the Special Rapporteur recognizes that it is necessary to consider other factors, including the object and purpose of the treaty and the specific circumstances of the conflict. The existing content of draft article 4 is certainly not incompatible with reference to such other factors and no doubt the formulation can be improved.

20. During the debate in the Sixth Committee a useful proposal was made for the reformulation of draft article 4:

[28] Ibid., para. 142.
[29] Ibid., para. 143.

> 1. Where a treaty indicates the intention of the parties relating to the termination or suspension of the treaty in case of an armed conflict, or where such intention may be deduced from the interpretation of the treaty, that intention shall stand.
>
> 2. In any other case, the intention of the parties to a treaty with regard to its termination or suspension in case of an armed conflict shall, in the event of disagreement between the parties in that regard, be determined by any reasonable means, which may include the *travaux préparatoires* of the treaty or the circumstances of its conclusion.
>
> 3. The foregoing shall be without prejudice to any decision that the parties may, by mutual agreement and without a breach of *jus cogens*, make at any time.[30]

21. There is, however, a need to avoid the assumption that draft article 4 should cover all possible issues in the same text. Draft article 4 was intended as a foundation provision which prefigures the following provisions and, in particular, draft article 7. The commentary to draft article 7 in the first report (A/CN.4/552, paras. 62-83) refers to a quantity of State practice on the various contextual bases on which intention may be discovered. Further materials are referred to in the memorandum prepared by the Secretariat (A/CN.4/550).

22. In addition, a proportion of the municipal case law indicates the significance of implications drawn from the object and purpose of a treaty. Relevant decisions include the following: *Établissements Cornet v. Vve Gaido*;[31] *In re Barrabini*;[32] *State v. Reardon*;[33] *Lanificio Branditex v. Societa Azais e Vidal*;[34] *Silverio v. Delli Zotti*;[35] *In re Utermöhlen*;[36] *Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven and William Wheeler*;[37] *Techt v. Hughes*;[38] *Goos v. Brocks*;[39] *Karnuth v. United States*;[40] *The Sophie Rickmers*;[41] *Clark v. Allen*;[42] *In re Meyer's Estate*;[43] *Brownell v. City and County of San Francisco*;[44] *Argento v. Horn*;[45] *Gallina v. Fraser* (U.S. District Court, D. Connecticut).[46]

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[30] Statement by Guatemala, A/C.6/60/SR.19, para. 4.

[31] France, Court of Appeal of Aix (7 May 1951), I.L.R. 1951, Case No. 155; Revue critique de Droit International Privé, 41 (1952), p. 697.

[32] France, Court of Appeal of Paris (28 July 1950), I.L.R. 1951, Case No. 156; Revue critique de droit international privé, 41 (1952), p. 453.

[33] *State v. Reardon*, United States, Supreme Court of Kansas (15 May 1926), 120 Kan. 614, 245 Pac. 158.

[34] Italy, 232 Court of Cassation, Joint Session (8 November 1971), 71 I.L.R. 595; 1 Italian Yearbook of International Law (1975).

[35] Luxembourg, High Court of Justice (30 January 1952), I.L.R. 1952, Case No. 118; Pasicrisie luxembourgeoise, vol. XV, p. 277.

[36] Netherlands, Court of Cassation (2 April 1948), A.D. 1947, Case No. 129; Nederlandse Jurisprudentie (1948), No. 442.

[37] United States, Supreme Court, 8 Wheaton 464 (U.S. S.Ct. 1823).

[38] United States, Court of Appeals of New York, 229 N.Y. 222, 243, 128 N.E. 185, 192 (1920), cert. denied 254 U.S. 643 (1920).

[39] United States, Supreme Court of Nebraska, 117 Neb. 750, 223 N.W. 13 (1929).

[40] United States, Supreme Court, 279 U.S. 231 (1929).

[41] United States, Southern District Court of New York, 45 F.2d 413 (S.D.N.Y. 1930).

[42] United States, Supreme Court, 331 U.S. 503, 513 (1947).

[43] United States, District Court of Appeal, California, 107 Cal. App. 2d 799, 805 (1951).

23. These decisions establish the general tendency of municipal courts in various jurisdictions to refer to the object and purpose of a treaty when deciding upon the effect of an armed conflict.

24. There is a particular question raised in several responses. Thus, the United States delegation observed:

> The Special Rapporteur considered that the intention of the parties at the time of the conclusion of the treaty should be determinative. This seems to my government to be problematic, since generally when parties negotiate they do not consider how its provisions might apply during armed conflict.[47]

25. With respect, this is to introduce a false dilemma. It is a common experience in the interpretation of treaties (and legislation) that the intention of the parties (or other actors) must be "reconstructed" as a practical hypothesis. And in this context the Special Rapporteur would agree with the further observation of the United States delegation:

> In order to address the issue it is necessary to consider other factors, including the object and purpose of the treaty, the character of the specific provisions in question, and the circumstances relating to the conflict.[48]

Similar proposals emerged during the debate within the Commission.[49]

26. There remain certain structural problems. These include the relationship of draft article 4 and draft article 7. It is the intention of the Special Rapporteur that these provisions would be applicable on a basis of coordination. It could be argued that, if draft article 4 is redrafted to refer to other factors, including object and purpose, then draft article 7 would become redundant.

27. In that case, the present content of draft article 7 would be incorporated in the commentary. However, this way of proceeding would involve a loss of substance. In fact, much, if not all, of draft article 7 reflects State practice and fairly uniform judicial standards.

28. And there is an additional structural problem. The drafting of draft article 4 entails reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties. This incorporation is necessarily mechanical but there could be no question of fashioning "designer" principles of interpretation for exclusive use in the present context.

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[44] United States, District Court of Appeal, California, 271 P.2d 974 (Cal. 1954).

[45] United States, Court of Appeals Sixth Circuit, 241 F.2d 258 (6th Cir. 1957).

[46] United States, District Court, Connecticut, 177 F. Supp. 856, 864; 31 I.L.R. 356, 367 (Dist. Conn. 1959).

[47] Summarized in A/C.6/60/SR.20, para. 32. See also *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 152.

[48] Summarized in A/C.6/60/SR.20, para. 32.

[49] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 153.

Draft article 5
Express provisions on the operation of treaties

1. Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

2. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

29. The purpose of this provision is explained in the first report (A/CN.4/552, paras. 55-58). General support was expressed in the Commission. It was accepted that the provision was necessary for the sake of clarity.

30. During the debate in the Commission reference was made to the principle enunciated in the advisory opinion of the International Court of Justice concerning nuclear weapons[50] to the effect that, while certain human rights and environmental principles do not cease in time of armed conflict, their application is determined by "the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[51] The Special Rapporteur agrees that this principle be appropriately reflected in the draft articles.

31. In paragraph 2 of the draft article the term "competence" should be replaced by "capacity".

Draft article 6
Treaties relating to the occasion for resort to armed conflict

A treaty, the status or interpretation of which is the subject matter of the issue which was the occasion for resort to armed conflict, is presumed not to be terminated by operation of law, but the presumption will be rendered inoperable by evidence of a contrary intention of the contracting parties.

32. The basis of this draft article is examined in the first report (A/CN.4/552, paras. 59-61). The thinking derives from the experience of the Special Rapporteur in the context of peaceful settlement of boundary disputes by judicial or other means. This draft attracted criticism in the Commission. The view was expressed that the draft article was, strictly speaking, not necessary in the light of draft article 3, which provision extended to a treaty whose interpretation may be the occasion for a conflict.[52] It was pointed out that the matter could be dealt with in the commentary to draft article 3.[53] A number of delegations expressed similar views during the debate in the General Assembly.[54]

[50] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports*, 1996, p. 226, at p. 240, para. 25.

[51] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 159. See also the statement of the United States, A/C.6/60/SR.20, para. 33.

[52] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 164.

[53] Ibid.

[54] See, for example, Romania, A/C.6/60/SR.19, para. 42.

33. The view of the Special Rapporteur is that the draft article should be deleted, and, if it is thought appropriate, the issue should be referred to in the commentary to draft article 3.

Draft article 7
The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

(a) Treaties expressly applicable in case of an armed conflict;

(b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

(c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

(d) Treaties for the protection of human rights;

(e) Treaties relating to the protection of the environment;

(f) Treaties relating to international watercourses and related installations and facilities;

(g) Multilateral law-making treaties;

(h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

(j) Treaties relating to diplomatic relations;

(k) Treaties relating to consular relations.

34. The policy of this presentation was explained by the Special Rapporteur in his introduction to the debate as follows:

> The Special Rapporteur observed that draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, i.e. as evidence of the object and purpose of the treaty to the effect that it survives a war. He clarified that while he did not agree with all the categories of treaties in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available

> State practice, particularly United States practice dating back to the 1940s. While closely linked to draft articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.[55]

35. The legal background to draft article 7 is examined extensively in the first report (A/CN.4/552, paras. 62-118). Reference is made to the substantial memorandum prepared by the Secretariat (A/CN.4/550). The role of draft article 7 can be analysed as follows:

(a) It can be justified as a piece of expository drafting which gives effect to the application of the principle established in draft article 4 in the sphere of State practice and the experience of municipal courts;

(b) As a drafting matter, draft article 7 is strictly superfluous. It is merely indicative and it provides a vehicle for the substantial research materials which have been used by the Special Rapporteur;

(c) In any event there is the view, expressed by a number of Commission members, and by Governments, that the use of categories as a tool of analysis was inherently flawed. The statement of the United States in the Sixth Committee, at the sixtieth session of the General Assembly, expresses this viewpoint very clearly:

> Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists twelve categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic because attempts at such broad categorization of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed.[56]

36. There is a distinction to be drawn here. On the one hand, it may be accepted that the use of categories of the type set forth in draft article 7 is heavy-handed and inadequate for drafting purposes. On the other hand, as indicated in the first report, most of the categories deployed are derived precisely from the policy and legal assessments of leading authorities, together with a significant amount of case law and practice. In other words, these materials indicate the very factors to which the United States refers in the statement quoted above.

37. At the end of the day, it may be that the solution lies within the realm of presentation. On this basis draft article 7 would be deleted: as has been emphasized already, its purpose was indicative and expository. The question then is to find an appropriate container for the materials on which draft article 7 has been built. The obvious answer would be an annex containing an analysis of the State practice and

[55] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 167.

[56] Summarized in A/C.6/60/SR.20, para. 34.

case law which could be prepared by the Secretariat with assistance from the Special Rapporteur.

38. A number of specific points arose in the discussion both in the Commission and in the Sixth Committee, apart from the general modalities of the categorization approach. In relation to subparagraph (a) the view was expressed that this category was unnecessary as it was already covered by draft article 5.[57] While this is analytically correct, the comment ignores the expository purpose of draft article 7. In fact, the category involved has generated some significant discussion of policy.

39. The United Kingdom of Great Britain and Northern Ireland regarded the inclusion of treaties relating to the protection of the environment as problematical (A/C.6/60/SR.20, para. 1).

40. Within the Commission, the category of treaties concerning a permanent regime or status was subjected to criticism as being ambiguous and open-ended.[58] The Special Rapporteur would point out that the category has been accorded major support in the doctrine, and is recognized by other legal sources.

41. The "system" problem which emerges from the discussion overall is the operation of a *lex specialis* in time of armed conflict, which operation rules out any principle of general continuity. This outcome affects the sphere of human rights. Here, although there is a good basis for continuity, the protection of human rights must be related to the law of armed conflict. And the same analysis applies to the application of environmental principles in armed conflict.

42. In the light of such considerations, it is clear that the formulation of specific principles of continuity is problematical. The indicative list may reflect the policies adopted by municipal courts and some executive advice to courts. It is not possible to argue that the list is supported by State practice in a conventional mode.[59]

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[57] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 171.

[58] See, inter alia, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 171.

[59] See the view of India, summarized in A/C.6/60/SR.18, para. 64.